Supreme Court, U.S.
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No. 08-360

Supreme Court of the United States

RICARDO DELGADO,

Petitioner,

v.

CERTIFIED GROCERS MIDWEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In holding that Ricardo Delgado was not disabled, or regarded as disabled, in the major life activity of working, did the United States Court of Appeals for the Seventh Circuit, as well as other Circuit Courts of Appeals, misinterpret the Americans With Disabilities Act?

II. In finding that Ricardo Delgado was not disabled, or regarded as disabled, in the major life activity of working, did the United States Court of Appeals for the Seventh Circuit err in failing to follow precedent from this Court and case law from other jurisdictions, and by finding that there were no genuine issues of material fact pending a trial by jury?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit affirming the United States District Court for the Northern District of Illinois' order granting summary judgment, is an unpublished decision: *Delgado v. Certified Grocers Midwest*, No. 07-314 (7th Cir. June 23, 2008). It may be found in Appendix A. The order and opinion of the District Court of the Northern District of Illinois, *Delgado v. Certified Grocers Midwest*, No. 06 C 2107 (N.D. Ill. August 16, 2007), may be found in Appendix B.

STATEMENT OF JURISDICTION

On July 23, 2008, the United States Court of Appeals for the Seventh Circuit affirmed the order of the United States District Court for the Northern District of Illinois granting summary judgment in favor of Certified Grocers Midwest ("Certified") against Ricardo Delgado ("Delgado"), who did not file a Petition for Rehearing. This case involves federal questions regarding the Americans With Disabilities Act, and Delgado seeks to appeal the Seventh Circuit's order pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

Applicable Provisions of Americans with Disabilities Act of 1990

42 U.S.C. § 12102, titled "Definitions," states:

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes–

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

STATEMENT OF THE CASE

Delgado is a forty-one year old male who has only a 6th grade education. (Delgado Dep. pg. 78; Delgado's deposition was attached to Certified's Motion for Summary Judgment). Delgado is currently unemployed, although he is attending school in order to obtain his GED and is continually searching for jobs. (Delgado Dep. pg. 41-43). He currently lives with his wife and two children, one of whom is a minor. (Delgado Dep. pg. 22).

Delgado was employed as a warehouse picker at Certified from August 31, 2000 until April 15, 2005, at which time his employment was terminated. (Delgado Dep. pg. 45; Delgado Dep. pg. 248 and 249). Delgado was fired after he was placed on permanent work restrictions by his physicians as a result of injuries he suffered while working at Certified. (Delgado Dep. pg. 253-254).

Delgado began his employment at Certified in the summer of 2000 as a temporary employee. (Delgado Dep. pg. 45-46). On August 31, 2000, Delgado was hired as a full time warehouse picker at Certified. (Delgado Dep. pg. 45-46). Delgado's duties as a warehouse picker included filling customer orders by picking up at the different locations in the warehouse all products a customer had purchased from different locations in the warehouse and preparing the customer's order for delivery. (Delgado Dep. at pg. 48).

On November 1, 2001, Delgado injured his shoulder at work and an ambulance was required to transport him to the hospital. (Delgado Dep. pg. 67, 88). Because of the injury he suffered at work, Delgado was told to take a leave of absence, which he did from November 21, 2001 to December 18, 2001. (Delgado Dep. pg. 192-193). Delgado's injury also forced him to work "light duty" from December 18, 2001 to February 12, 2002. (Delgado Dep. pg. 192-193).

Delgado's injury forced him to take another leave of absence from February 13, 2002 to October 13, 2002. (Delgado Dep. pg. 143). During that time, Delgado continued to seek treatment from his physicians. (Delgado Dep. pg. 143). Delgado returned to work on October 14, 2002 after being released by Dr. Saeed to full duty work with no restrictions. (Delgado Dep. pg. 199-201).

On June 11, 2003, Delgado re-injured his shoulder while working at Certified. (Delgado Dep. pg. 212-213). Even with that injury, Delgado attempted to continue working, and remained on full duty without restrictions until August 21, 2003. (Delgado Dep. pg. 215). On August 21, 2003, Delgado's physician, Dr. Hadesman, placed him on light duty with restrictions. (Delgado Dep. pg. 217-218). The restrictions included lifting no more than 50 pounds from waist to floor, lifting no more than 25 pounds from waist to shoulder and lifting no more than 10 pounds overhead. (Delgado Dep. pg. 217-218).

On January 26, 2004, after consulting with Dr. Hadesman and Dr. Visotsky, his surgeon, Delgado had surgery on his shoulder to treat the injuries he sustained

while working at Certified. (Delgado Dep. pg. 228-229). Because of the surgery, Delgado was forced to take a leave of absence from January 26, 2004 through May 18, 2004. (Delgado Dep. pg. 228-229). On May 18, 2004, Delgado returned to work with restrictions, and was placed on light duty work while he continued to physically recover. (Delgado Dep. pg. 230).

Delgado continued to follow up with Dr. Visotsky, who changed his lifting restrictions on June 11, 2004 to no more than 100 pounds, but no overhead lifting. (Delgado Dep. pg. 131). On October 8, 2004, Dr. Visotsky determined that Delgado had achieved maximum medical improvement. (Delgado Dep. pg. 232-234). As a result of his physician's determination, Delgado was placed on permanent restrictions consisting of no overhead lifting and no frontal plain lifting over 50 pounds. (Delgado Dep. pg. 232-234). In November, 2004, Delgado noticed numbness, tingling and swelling in his arms, and he sought treatment from Dr. Visotsky. (Delgado Dep. pg. 242). Dr. Visotsky diagnosed Delgado with Carpel Tunnel Syndrome, and he was placed on a leave of absence. (Delgado Dep. pg. 243). From November, 2004, through April, 2005, Delgado continued to follow up with Dr. Visotsky, Dr. Hadesman, and Dr. Spencer, all of whom recommended that Delgado be permanently restricted to lifting limitations. (Delgado Dep. pg 243-246).

Delgado tried to return to work in April of 2005. (Delgado Dep. pg. 248). At this time, Delgado presented to Certified a note from Dr. Spencer that his lifting restrictions were permanent. (Delgado Dep. pg. 248). Because of his permanent medical restrictions, Certified

sent Delgado home on April 15, 2005, effectively firing him. (Delgado Dep. pg. 248). Under company policy, light duty employees are terminated after Certified receives notification from a physician that an employee has a permanent medical restriction. (Traub Dep. pg. 248). Delgado was instructed by Dominic Rosey, his union steward, not to file a grievance but to hire a lawyer. (Delgado Dep. pg. 254).

Since being fired, Delgado has applied for hundreds of jobs and attended several job fairs. (Plaintiff's Statement of Material Facts, Ex. G). Because of Delgado's lack of education and medical restrictions, he has had severe difficulties finding employment for manual labor jobs, which are the only jobs for which he is qualified. Delgado has been forced to conceal his medical history, and Delgado's vocational rehabilitation advisor, Mr. Vocacio, told Delgado that he should not mention his work restrictions when he applies for work. (Delgado Dep. pg. 121-122). He has also been denied employment, presumably because of his restrictions. (Delgado Dep. pg. 87-88).

Delgado is currently unemployed as he cannot find employment because of his physical limitations. (Delgado Dep. pg. 42-43). Delgado cannot do household chores, such as cooking, sweeping, vacuuming, making beds and washing dishes by hand. (Delgado Dep. pg. 44). He is also limited to playing only card games, checkers and drawing with his children, as he cannot engage in sports or other physical activities. (Delgado Dep. pg. 45).

Delgado filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC")

on December 29, 2005. Upon receiving a Right to Sue Letter, Delgado filed this lawsuit in the United States District Court for the Northern District of Illinois. (Complaint, U.S. District Court Docketing No. 1). Delgado alleged that he was terminated because of his disability in violation of the Americans with Disabilities Act. Because the case involved a federal statute, the District Court had jurisdiction pursuant to 28 U.S.C. §1331. On August 16, 2007, the District Court granted Certified's Motion for Summary Judgment.

Delgado timely filed a Notice of Appeal in the Court of Appeals for the Seventh Circuit. (Notice of Appeal, U.S. District Court Docketing No. 54). On June 17, 2008, oral argument presented and on June 23, 2008, the Seventh Circuit affirmed the District Court's order. The Seventh Circuit reasoned that Delgado had not established that he is disabled in the life activity of working, or that he was "regarded as" disabled in the major life activity of working. Delgado did not file a Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

Only 18 years after its passage, the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S. §§ 12101-12213, is on the verge of extinction. Disability advocates and commentators alike agree that the ADA has lost much of its force. Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disability Act*, 117 YALE L.J. 992 (2008). Because of decisions of lower courts, plaintiffs, such as Delgado, are often forced to focus almost exclusively on whether or not they have an "impairment" that "substantially limits a major life activity."

In this case, there is no issue that Delgado's shoulder injuries are physical impairments. Rather, the primary issue is whether Delgado's impairments substantially limited him in a major life activity. This boils down to the question of whether or not Delgado was disabled. Since a plaintiff's primary focus must necessarily be on showing that he or she is disabled, plaintiffs are deflected from focusing on the primary evil intended to be remedied by the ADA: an employer's discrimination. Lower courts have also made it almost impossible for individuals to establish that they fall within the "regard as" prong of the ADA's definition of disability. A combination of these factors create a barrier to judicial relief which is almost impossible for plaintiffs to overcome. As a result, the ADA as the acclaimed protector against employment discrimination has little (if any) force or effect.

In its few "ADA decisions", this Court has only had to speak in generalities about the major life activity of working. The lower courts have therefore been more or less free to establish standards that make it almost impossible for a plaintiff to prove he or she was disabled. This Court's guidance is required to effectuate the intent of the ADA. Congress has already begun to act to correct judicial misinterpretations of the ADA which have narrowed the class of individuals who are considered disabled. On June 25, 2008, the United States House of Representatives overwhelmingly passed the ADA Amendments Act (H.R. 3195).

Further, in affirming the order of the District Court to grant Certified's Motion for Summary Judgment, the Seventh Circuit acted contrary to case law from other

circuits, and contrary to its own precedent, and most importantly contrary to precedent from this Court. There was sufficient evidence presented by Delgado to establish genuine issues of material fact, and the District Court's and Seventh Circuit's decisions should be reversed.

For these reasons, Delgado requests the Court grant his Petition for a Writ of Certiorari.

A. The ADA and the Court's Jurisprudence Regarding Title I of the ADA.

Title I of the ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability. Specifically, the ADA states that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is identified as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The ADA defines a "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

Although this Court has not yet "officially" recognized working as a major life activity (it has accepted without deciding that working is major life activity), every court of appeals that has considered the issue has done so. *Mullins v. Crowell*, 228 F.3d 1305, 1313 (11th Cir. 2000); *Sinkler v. Midwest Prop. Mgt. Ltd. Partn.*, 209 F.3d 678, 684 n. 1 (7th Cir. 2000); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654-55 (5th Cir. 1999); *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir. 1999).

The EEOC has also determined that working is a "major life activity." 29 CFR § 1630.2(i). The EEOC has defined being impaired in one's ability to work as being "significantly restricted in the ability to perform either a class of job or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." According to the EEOC, to establish a "class" or "broad range" of jobs, the following factors should be considered: the geographical area to which the individual has reasonable access, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within the geographical area from which the individual is also disqualified. 29 C.F.R. § 1630.2(j)(3)(ii).

The "Interpretive Guidance" accompanying 29 C.F.R. § 1630.2 offers examples of impairments that the EEOC believes fit statutory requirements. These

examples include an individual who has a back condition that prevents the individual from performing any heavy labor job as being substantially limited in the major life activity of working. This would be so even if the individual were able to perform jobs in another class. Delgado's lifting restrictions follow the same pattern as this example.

It is within this framework that the Court decided *Sutton v. United Airlines*, 527 U.S. 471 (1999). *In Sutton*, the plaintiffs, severely myopic twin sisters, contended that United Airlines mistakenly believed that their physical impairment, their visual acuity, substantially limited them in the major life activity of working. *Id.* at 475-476.

The Court did not need to decide whether the term "major life activity" includes working because both parties accepted that working was included in the term "major life activities." *Id.* at 492. The Court held when the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that the plaintiffs allege they are unable to work in a broad class of jobs. *Id.* at 492-493. The Court quoted the EEOC's standard for what "substantially limits" means when applied to the major life activity of working: "significantly restricted in the ability to perform either a class of job or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." *Id.* at 491

According to the Court, if jobs utilizing an individual's skills are available, one is not precluded from a substantial class of jobs. *Id.* at 492. The Court also

held that because the plaintiffs only alleged that the defendant "regarded" their poor vision as precluding them from holding the position as a "global airline pilot," the plaintiffs failed to adequately allege that their poor eyesight is "regarded as" an impairment that substantially limits them in the major activity of working. *Id.* at 493.

In *Murphy v. United Parcel Services, Inc.*, 527 U.S. 516 (1999), the Court ruled that the plaintiff failed to demonstrate that there is a genuine issue of material fact as to whether he is regarded as disabled. *Id.* at 524. According to the Court, the plaintiff was fired from his position as a UPS mechanic because he had a physical impairment, hypertension, that was viewed as preventing him from obtaining health certification. *Id.* at 519-520. The Court held that at most the plaintiff only showed that he was regarded as unable to perform the job of a mechanic. *Id.* at 524. According to the Court, because plaintiff failed to show that he was regarded as unable to perform a class of jobs, he was, as a matter of law, unable to prove that he was regarded as substantially limited in the major life activity of working. *Id.*

In *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the Court held that the "class of jobs analysis" articulated in *Sutton* should not apply outside the context of the major life activity of working. *Id.* at 200. Specifically, the Court held that when addressing the major life activity of performing manual tasks, the central inquiry must be whether a plaintiff is unable to perform a variety of tasks central to people's daily lives, not whether a plaintiff is unable to perform the tasks associated with her specific job. *Id.*

B. This Court's Guidance is Required.

The lower courts have made it exceedingly difficult for individuals to establish that they are substantially limited in the major life activity of working. There is now an almost impossible standard of proof for disabled individuals, like Delgado, who have suffered adverse employment actions but cannot establish that they are substantially limited in any major life activity other than working. Although Delgado can perform most "life activities," because his physical impairments, limited education and experience, he cannot work.

Actually, the Court has yet to really rule on whether proof that one cannot perform the essential functions of *a* job (or is perceived by an employer as being unable to do so) is sufficient to establish a substantial limitation in working. In *Sutton*, *Murphy*, and *Williams*, the Court assumed the regulations interpreting the term "substantially limits" were reasonable and applied the EEOC's "broad range of jobs" standard under § 12102(2)(a) and (c) of the ADA's definition of disability. As some circuit courts of appeals have recognized, the Court has only spoken in "generalities" about these issues, and there is no "final word." *Rossbach v. City of Miami*, 371 F.3d 1354, 1360 (11th Cir. 2004).

Without the Court's specific pronouncement, lower courts have improperly required plaintiffs to meet a heavy, and in realty impossible, burden to demonstrate that their physical and mental impairments substantially limit their ability to work. ADA plaintiffs lose Title I cases the vast majority of the time. Michael Waterstone. *The Untold Story of the Rest of the American's with*

Disability Act, 58 VAND. L. REV 1807, 1812-1813 (2005)(citing statistics that defendants prevail 94% of the time in Title I cases). One commentator notes that only plaintiffs in prisoner civil rights cases fare worse than ADA plaintiffs. Ruther Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L.L. REV. 99, 100 (1999).

ADA plaintiffs face many obstacles. Most lower courts have ruled against plaintiffs claiming a substantial limitation in working, finding that the individuals were not sufficiently restricted from performing a broad range of jobs. In making these rulings, the courts of appeals seem to recognize that the burden placed on plaintiffs is "weighty" and constitutes an "ambitious" task. *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1168 (1st Cir. 2002). Why should that be? Why shouldn't the proper intent of the ADA be recognized?

Another example: in *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (D.C. Cir. 2001), the Court of Appeals for the District of Columbia Circuit held that in order to prove substantial limitation in working, plaintiffs must produce some evidence of the number and types jobs in their local job market. *Id.* at 1115-1116. The plaintiff presented evidence to confirm a substantial limitation through expert medical testimony that the plaintiff's back condition and lifting restriction were permanent. *Id.* The plaintiff also presented evidence of his age, limited skills, limited education and limited experience and of his inability to find comparable employment after his discharge. *Id.* at 1115. In holding that the plaintiff was

not disabled, the *Duncan* court found that the evidence tells nothing "about the number and types of jobs in the Washington, D.C. area for which Duncan is qualified and which are therefore available to him." *Id.*

In *Rossbach v. City of Miami*, 371 F.3d 1354 (11th Cir. 2004), the Court of Appeals for the Eleventh Circuit ruled that five police officers who sustained various injuries while performing their jobs were not substantially limited in working. The *Rossbach* court ruled that the job of a police officer is "too narrow" a range of jobs to constitute a "class of jobs." *Id.* at 1361. Thus, according to the *Rossbach* court, the plaintiff and his fellow officers failed to show that each was disabled under the ADA. *Id.* at 1361-1362. One might wonder about the common sense of that analysis.

In T*aylor v. Nimock's Oil Co.*, 214 F.3d 957 (8th Cir.2000), the Court of Appeals for the Eight Circuit concluded a former cashier with a 40 hour week and 10 pound carry limit did not establish disability because she "presented no evidence to create a genuine issue of material fact about whether she could perform a class of jobs with her restrictions." *Id.* at 961-962.

In *Broussard v. University of California*, 192 F.3d 1252 (9th Cir. 1999), the Court of Appeals for the Ninth Circuit found no genuine issue of material fact and dismissed a vocational expert's findings as "conclusory"because the expert failed to take the plaintiff's vocational abilities in to account and had not compared the jobs she could do before or after her impairment. *Id.* at 1257-1258.

In *Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001),the Court of Appeals of the Seventh Circuit rejected the argument that because the plaintiff could not lift more than 45 pounds, was unable to engage in strenuous work and was unable to drive a forklift, he was restricted in his ability to work. *Id.* at 763. The *Contreras* court believed that the plaintiff presented "no evidence" of disability. *Id.*

Several stern trends are evident from the lower court decisions. Medical and vocational expert testimony is almost always necessary to demonstrate a significant restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person, whoever that might be.

Also, the standards imposed by lower courts do not take into account that the ability to perform comparable jobs may depend upon the extent to which other employers have the same or similar conditions, practices and restrictions as does the defendant employer, and upon the other employers' willingness (or unwillingness) to make necessary accommodations to a plaintiff's condition. This kind of evidence is obviously difficult and often impossible for a plaintiff to obtain.

Further, even if plaintiffs can marshal significant demographic data and other evidence establishing that they are unable to work in a "class of jobs" or a "broad range of jobs" (which most often they cannot), they must also establish that, at least with a reasonable accommodation, they are still "qualified" to perform the job in question. Aren't the two requirements in conflict? One district court has perceptively suggested that

proving that one is substantially limited in working and simultaneously was qualified for the particular job is impossible. *Everette v. Runyon*, 911 F. Supp. 180, 183-184 (E.D.N.C. 1995).

Under the "regarded as" prong (§ 12102(2)(c), which was intended to be a "catchall," some courts of appeals have correctly recognized that these cases are extraordinarily difficult because the question is almost entirely in the employer's state of mind. *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001). Even the *Delgado* court said plaintiffs must show that not only that his or her employer regarded him or her disabled, but also that the employer regarded the plaintiff as precluded from a broad class of jobs. (Appendix A, pg. 10a). This leaves plaintiffs, such as Delgado, at a insurmountable disadvantage. Employers do not regularly consider other jobs for their employees to perform, and rarely can direct evidence of such considerations be found. Employers can simply argue that they had no opinion as to whether the plaintiff could perform a variety of jobs, and what can a plaintiff do about that? If an employer fires an employee because of a disability, how can it deny that it regarded him or her as being disabled? Requiring a plaintiff to prove that the employer regarded him as disabled as to a "broad class of job" essentially forecloses any recovery under § 12102(2)(c).

This case is a prime example of all of these difficulties, and shows the need for this Court's direction in order to give proper effect to the intent of the ADA. Delgado has little education (6th Grade), and his work experience has been limited to manual labor type jobs.

The only work Delgado knows how to do involves manual labor and heavy lifting, which he can no longer do because of his physical impairment. Because of the lower court's and the Seventh Circuit's decisions, Delgado faces an almost insurmountable task in proving that he was "disabled", let alone discriminated against (a stated purpose of the ADA).

Such harsh burdens of proof prevent disabled plaintiffs, such as Delgado, from having their "day in court," and excessively discourage the filing ADA lawsuits. To prevent such a result, which is clearly against the intent of the ADA, this Court should establish more reasonable and realistic burdens of proof and restore balance to the use and application of the ADA.

By reason of the above and forgoing, the Court should grant Delgado's Petition for Writ of Certiorari.

C. The *Delgado* Decision is Contrary to This Court's Precedent and other Circuit Decisions, and There are Genuine Issues of Material Fact.

There have been some cases in which plaintiffs have prevailed on their claims of substantial limitations in working. These usually involve employees who have worked for a long time in one job, have limited education or skills, or live in an area where employment opportunities are limited. The evidence is clear that Delgado has limited education and skills which should have precluded summary judgment from being entered against him.

In *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3d Cir. 1998), the Court of Appeals for the Third Circuit ruled a supermarket employee, who had a sixth-grade education (same as Delgado) and had worked as a meat cutter for 35 years, could proceed with an ADA claim that a back injury substantially limited his ability to work.

In *Wellington v. Lyon County School Dist.*, 187 F.3d 1150 (9th Cir. 1999), the Court of Appeals for the Ninth Circuit held that despite presenting no expert testimony or "other evidence"in considering the plaintiff's "training, skills and abilities," there existed a question of fact as to whether he is "significantly restricted in the ability to perform work in a class of jobs," specifically, construction, maintenance and plumbing, and whether he is "disabled" within the meaning of the ADA. *Id.* at 1154. The plaintiff had a high school education, and his work experience included only construction, maintenance and plumbing jobs. *Id.*

Further, the Court of Appeals for the Seventh Circuit ignored its own *DePaoli v. Abbott Lab.*, 140 F.3d 668 (7th Cir. 1998)(determining that the plaintiff had presented sufficient evidence through her physicians that she was precluded from a "class"of jobs, assembly line work in the Chicago economy because she could not perform repetitive motions with her hand); *Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997)(holding that a reasonable trier of fact could have determined that the plaintiff's knee condition substantially limited his ability to work as a truck driver, despite no evidence showing how many truck driving jobs require the ability to operate a truck with a clutch or how often the particular

configuration of the seat and clutch occurs); and *Cochrum v. Old Ben Coal Company*, 102 F.3d 908, 911 (7th Cir. 1996)(holding that a reasonable trier of fact could have concluded that a shoulder injury that interfered with heavy lifting, pulling or pushing was a disability disqualifying plaintiff from broad class of "heavy labor" jobs).

Because of his work restrictions, Delgado is obviously precluded from any heavy or manual labor job. Delgado is limited to this type of employment because of his age, his limited education and the fact that he had been engaged in physical labor for his entire working career. Delgado has a 6th grade education, and his employment experience is limited to jobs that are similar in skill level to the position he held at Certified. Delgado's physical impairments restrict him from a broad class of jobs involving heavy labor; Delgado cannot perform a "class" of jobs in the Chicago economy as a result of his disability.

A jury could reasonably conclude, based on the evidence and their own collective experience, that Delgado could not preform a broad class of jobs. It is not or should not be necessary for a vocational expert prepare a report or testify for the purpose of establishing that a class of jobs require the ability to lift 25 pounds, and this Court has never established a *per se* rule requiring such testimony.

The *Delgado* court also relied (almost as a matter of law) on *Contreras v. Suncast Corp.* in affirming the District Court's decision. The *Delgado* court stated that *Contreras* "held that a forklift operator who was unable

to lift more than 45 pounds, unable to engage in strenuous work, and unable to drive a forklift for more than four hours a day had not "presented evidence that even hints at the notion that he is precluded from a broad class of jobs." (Appendix A, pg. 8a). By relying on *Contreras* to find that Delgado's restrictions were not as broad as the plaintiff's restrictions in *Contreras*, is it not clear that the *Delgado* court did not conduct the individualized inquiry required by this Court? This Court has repeatedly stated that an individualized assessment of an impairment is necessary when determining whether an individual is disabled. *Toyota Motor Mfg., Kentucky, Inc.*, 534 U.S. at 199. Such an individualized assessment was not performed by the District Court nor the Seventh Circuit.

A jury could reasonably conclude, based on the evidence and their own collective experience, that Delgado could not preform a broad class of jobs. By considering the job advertisements presented by Delgado and by using common knowledge about these types of jobs, a jury could reasonably believe Delgado to be excluded from these jobs, and in turn, the major life activity of working. The evidence is there and a jury could conclude that Delgado would be excluded from a class of jobs due to his lack of qualifications and low lifting restrictions.

Delgado presented more than "mere proof" that his impairments prevented him from performing a particular job for Certified. There is evidence that because of his injuries and restrictions, Delgado is excluded from an entire "class" of jobs giving rise to a genuine issue of material fact as to whether his impairment "substantially limits" a major life activity.

The *Delgado* court's decision was contrary to existing precedent, and against the manifest weight of the evidence. There are genuine issues of material fact that require resolution by a jury and this Court should grant his Petition for a Writ of Certiorari.

CONCLUSION

Based on the above and foregoing, this Court should grant Delgado's Petition for a Writ of Certiorari, and allow Delgado to appeal the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 23, 2008

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued June 11, 2008
Decided June 23, 2008

Before

DANIEL A. MANION, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 07-3140

RICARDO DELGADO,

Plaintiff-Appellant,

v.

CERTIFIED GROCERS MIDWEST, INC.,

Defendant-Appellee.

ORDER

Ricardo Delgado sued Certified Grocers Midwest (Certified) alleging discrimination on the basis of a disability in violation of the Americans With Disabilities Act of 1990(ADA), 42 U.S.C. §§ 12101-12213, when he

was fired after being injured on the job. The district court granted the defendant's motion for summary judgment. Because Delgado has failed to show that he is disabled under ADA, we affirm.

Delgado, who is 41 years old and has a sixth-grade education, began working as a "warehouse picker" at Certified in August 2000. This job required that Delgado work in refrigerated areas of the warehouse, and his job duties included manually lifting and carrying items between 1 and 100 pounds taken from bins located 5 inches to 6 feet off the floor. Throughout Delgado's employment, he was a member of a local union and was subject to the collective bargaining agreement between the union and Certified. In November 2001 Delgado injured his shoulder at work and was taken to the hospital by ambulance. Over the next 3 1/2 years, Certified provided him with several leaves of absence and at other times allowed him to work in "light-duty" jobs. Light-duty jobs are temporary jobs created by an employee's supervisor to provide meaningful work within an employee's restrictions during the employee's rehabilitation period. When Delgado first returned to work, he performed a light-duty job for 8 weeks, but when that period ended in February 2002, instead of returning to his regular job he again took a leave of absence because of his injury. This time Delgado did not return to work until 8 months later, when his physician gave him clearance to work without restrictions.

In June 2003 Delgado reinjured his shoulder at work. Nevertheless, over the next two months he

continued to work without restrictions while he sought treatment from doctors. In August 2003, however, Delgado's physician again limited him to light-duty work with lifting restrictions for three months. In January 2004 Delgado had surgery on his shoulder and took another leave of absence until May 2004, when he returned to light duty for 7 months. During this light-duty period, Delgado's physician reduced his medical restrictions, allowing him lift 100 pounds so long as he did not lift objects above his head. Delgado continued to perform light-duty work until November 2004, when Certified placed him on a leave of absence after his physician diagnosed him with Carpal Tunnel Syndrome. Soon thereafter, Delgado's physician determined that his injuries would not improve and imposed permanent restrictions that limited him to lifting no more than 50 pounds on occasion and frequently lifting or carrying no more than 25 pounds. Delgado's physician also instructed him to avoid working in chilled environments.

Delgado attempted to return to work in April 2005 and gave Certified a note from his doctor documenting his permanent restrictions. Because Delgado could no longer perform his duties as a warehouse picker, Certified fired him. Delgado did not request that Certified provide him with accommodations that would permit him to do his job, nor did he apply for any other jobs at Certified.

Certified did not have any permanent jobs under the jurisdiction of Delgado's local bargaining unit that he could perform with his physical limitations, and the

union does not allow employees to shift outside of their local unit. Since leaving his job at Certified, Delgado has had only one job, which Certified helped him find by providing him with vocational training, but he left that job because he was not paid on time and because he was required to work beyond his restrictions. His vocational counselor advised him not to mention his work restrictions in job applications and suggested that Delgado discuss his injury in interviews instead. Delgado has received several job offers since then, including an offer to be a forklift driver and two offers to be a baggage handler. But in each case, Delgado failed to notify his would-be employers of his work restrictions. Furthermore, he did not show up for work because he presumed that the jobs would require labor outside his work restrictions.

Delgado then timely filed suit against Certified, alleging that it fired him to avoid its obligation under the ADA to accommodate his disabilities. Certified moved for summary judgment. As part of his response to Certified's motion, Delgado submitted two unusual exhibits. First, he submitted an affidavit from his attorney (he had a different attorney on appeal) describing her "admittedly highly unscientific" internet job search to determine if Delgado's work restrictions significantly hindered his ability to find work, although she did not appear to draw any conclusions from her "study ." Appended to this affidavit were 50 pages of internet search results and job descriptions. In addition, Delgado submitted over 150 pages of job applications, fax cover sheets, drug test forms, and response letters

from employers, presumably meant to illustrate the extent of his thwarted job search after leaving Certified.

The district court granted Certified's motion for summary judgment. The court found that Delgado had not presented evidence that his physical impairments excluded him from a broad class of jobs and that he therefore was not disabled under the ADA. The court reasoned that Delgado's job offers contradicted his "bare assertions" that his work restrictions prevented him from seeking employment. Moreover, the court noted that Delgado had provided no evidence suggesting that he was ever turned down for a job based on his work restrictions. The court next rejected trial counsel's affidavit as inadmissible scientific evidence under Federal Rule of Evidence 702. The court also found that Delgado had presented no evidence that Certified regarded him as disabled and observed that Certified's actions did not evidence a general belief that Delgado was unable to work at a broad class of jobs. The court concluded that because Delgado admitted that his restrictions precluded him from performing the essential functions of his job—and that no accommodation exists that would allow him to perform those functions—he is not a "qualified individual" under the ADA.

On appeal Delgado argues that he was terminated because he was disabled, that Certified regarded him as disabled, and that Certified could have accommodated his disability by transferring him to a different position. To avoid summary judgment, Delgado

must show that there is a genuine issue of material fact regarding whether he is a "qualified individual with a disability" under the ADA. *See Kupstas v. City of Greenwood*, 398 F.3d 609, 611 (7th Cir.2005). According to the ADA, a disability is " '(A) a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.' " *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 781 (7th Cir.2007) (brackets in original) (quoting 42 U.S.C. § 12102(2)). In short, Delgado must present evidence that he was disabled under one or more of these definitions and that he was qualified to perform the essential functions of his job with or without reasonable accommodations. *See id.; see also EEOC v. Sears, Roebuck & Co.*, 417 F.3d at 789, 796-97 (7th Cir.2005).

Delgado argues that there is a genuine issue of material fact regarding whether his injury "substantially limits" the major life activity of being able to work. Delgado contends that he "is obviously precluded from virtually any heavy or manual labor job" based on his work restrictions and claims that his job options are limited because of his age and education. Delgado maintains that the classified advertisements, cover letters, drug tests, and job applications that he submitted were evidence of his restricted ability to perform a broad class of jobs because "presumably" his lack of job offers was a result of his physical impairments. The job offers that he did receive are of no consequence, Delgado argues, because he was

"forced to conceal his injuries in order to attempt to obtain employment, as recommended by his vocational counselor," and so his potential employers were unaware of his work restrictions.

When a plaintiff claims that he is "substantially limited" in the major life activity of working, he must show that he is " 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.' " *Kupstas*, 398 F.3d at 612 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). The injury must limit employment generally, not merely preclude an employee from a particular job or a narrow range of jobs. *Id.* at 613. In general, a claimant must present "some evidence of the number and types of other jobs in the geographical region, from which he would be excluded because of his perceived impairments." *Id.* at 613 (internal quotation marks and citation omitted). The requirement to show evidence of general employment demographics, however, is not a per se rule, and in rare cases claimants' "impairments are so severe that their substantial foreclosure from the job market is obvious." *EEOC v. Rockwell Int'l Corp.*, 243 F.3d 1012,1017 (7th Cir.2001).

Delgado cites *DePaoli v. Abbott Labs.*, 140 F.3d 668 (7th Cir.1998), *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir.1997), and *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908 (7th Cir.1996), to support his contention that this case is one of those rare cases in which his physical limitations alone, without any further evidence of what

jobs might be available to him, are sufficient to show that he is precluded from performing any manual labor jobs. In *DePaoli*, we concluded that an assembly line worker who could not perform repetitive motions with her right hand because she had tendinitis could establish that she was disabled because this impairment alone was evidence that she could not perform any assembly line work. *DePaoli*, 140 F.3d at 673. In *Best*, we held that evidence of a truck driver's knee injury, which precluded him from driving, was sufficient to overcome summary judgment on the question whether he was disabled under the ADA. *Best*, 107 F.3d at 548. And in *Cochrum*, we held that a coal miner's shoulder injury, which prevented him from performing overhead work, heavy lifting or pulling, and pushing out from his body, might preclude him from performing a broad range of jobs and that "given the breadth of his physician's physical restrictions, a reasonable jury could conclude that Cochrum's shoulder impairment does substantially limit his ability to work." *Cochrum*, 102 F.3d at 911.

Delgado's restrictions, however, are not nearly as broad as those of the plaintiffs in *DePaoli*, *Best*, and *Cochrum*. More importantly, his impairments are not so severe that his "substantial foreclosure" from the job market is obvious. Delgado is significantly more able than the plaintiffs in the cases he cites because he can continue to lift up to 50 pounds on occasion and up to 25 pounds continuously. In *Contreras v. Suncast Corp.*, 237 F.3d 756, 763 (7th Cir.2001), we held that a forklift operator who was unable to lift more than 45 pounds, unable to engage in strenuous work, and unable to drive

a forklift for more than four hours a day had not "presented evidence that even hints at the notion that he is precluded from a broad class of jobs." In that case, we specifically distinguished *DePaoli*, *Best*, and *Cochrum*, observing that the "breadth of the restrictions placed on plaintiffs and their doctors' recommendations concerning how their respective injuries would affect their ability to obtain other employment" far exceeded the restriction placed on Contreras. *Id.* at 763 n. 5. Delgado's inability to lift more than 50 pounds does not support his assertion that he is "obviously precluded from virtually any heavy or manual labor job," particularly given the dearth of evidence documenting the requirements of typical manual-labor jobs. *See Peters v. City of Mauston*, 311 F.3d 835, 844 (7th Cir.2005); *see also Squibb*, 497 F.3d at 783.

Delgado's job search further undermines his claim that he is substantially restricted from a broad class of jobs. Delgado received several job offers that he chose to disregard because he presumed that the jobs would exceed his restrictions, although there is no evidence showing that Delgado's assumption was correct. Delgado suggests that because the employers who offered him jobs did not know of his physical impairments, we should make the negative inference that the many employers who rejected his job applications did so only because they were aware of his physical impairments. This is nonsensical, purely speculative, and particularly unpersuasive considering that it was Delgado's decision not to inform potential

employers of his impairments. Despite scores of pages of exhibits, Delgado has presented no evidence that his failure to obtain a job was the result of his injury.

Delgado also argues that he is disabled under the ADA because Certified regarded him as disabled. This argument hangs on an even thinner reed. Delgado maintains that the fact that he was fired after being placed on permanent lifting restrictions is sufficient evidence that Certified regarded him as disabled. But the evidence in the record shows only that Certified fired Delgado because he could no longer perform his specific job as a warehouse picker. It is unclear how the circumstance of Delgado's termination, in itself, could be evidence that Certified regarded him as unable to work in a broad class of jobs. *See Kupstas*, 398 F.3d at 613. At most, Delgado's termination demonstrates only that Certified regarded him as unable to work in the specific job of warehouse picker. *Cf. id*. at 612. This is insufficient to show discrimination. *Id.* at 614-15; *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002). Delgado has failed to present any other evidence that he was disabled under the ADA, and thus his claim must fail.

Moreover, even if Delgado were able to demonstrate that he is disabled, he has failed to show that there is a genuine issue of material fact regarding whether he is a "qualified individual with a disability" under the ADA. A qualified individual with a disability is " 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions' "

of the job that he has or desires. *Sears, Roebuck & Co.*, 417 F.3d at 797 (quoting 42 U.S.C. § 12111(8)). The ADA requires that an employer make " 'reasonable accommodations' to a disabled qualified employee's limitations, unless the employer can demonstrate that to do so would impose an 'undue hardship.' " *Id*. at 802 (quoting 42 U.S.C. § 12112(b)(5)(A)). The burden is on the plaintiff to show that there is a vacant position for which he is qualified, and only then may we consider whether the failure to provide an accommodation was caused by a flaw in the interactive process. *Jackson v. City of Chicago*, 414 F.3d 806, 813 (7th Cir .2005).

The parties do not dispute that Delgado's work restrictions prevented him from working in the refrigerated warehouse. But Delgado has failed to submit evidence that there was any reasonable way for Certified to accommodate that restriction, nor does he point to any available positions for which he was qualified. Delgado maintains that Certified should have accommodated his disability by transferring him to a permanent light-duty position. He contends that the fact that Certified allowed him to perform light-duty work for more than eight weeks "calls into question the temporary nature of light duty work." Although it is true that Certified permitted Delgado to remain on light duty for longer than the eight-week maximum specified in the collective bargaining agreement, this is not enough to "call into question" the temporary status of light-duty work, nor should Certified be punished for maintaining a flexible rehabilitation program. The undisputed evidence shows that Certified often allowed its

employees to remain on light duty as long as they were reasonably expected to fully recuperate. The record also shows that no permanent light-duty positions existed at Certified. The ADA does not require Certified to create a job for Delgado or permanently assign him to light-duty work. *See Watson v. Lithonia Lighting*, 304 F.3d 749, 752 (7th Cir.2002).[1] Therefore, Delgado has failed to meet his burden to show that Certified could have made reasonable accommodations.

Because Delgado has failed to show that he is disabled under the ADA, we AFFIRM the judgment of the district court.

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1. Delgado suggests that the merger of two local unions made jobs available that he could have worked. There is no evidence in the record, however, suggesting that such a merger would expand the universe of jobs available to Delgado, that Delgado was qualified for any jobs covered by the merged bargaining unit, or that any vacancies existed for any jobs covered by that bargaining unit.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION AUGUST 16, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

06 C 2107

RICARDO DELGADO,

Plaintiff,

vs.

CERTIFIED GROCERS MIDWEST,

Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge.

This matter comes before the Court on Defendant Certified Grocers Midwest's ("Certified Grocers") motion for summary judgment. For the following reasons, summary judgment is granted in favor of Certified Grocers.

Appendix B

BACKGROUND

In assembling the recitation of material facts relevant to our decision, we have disregarded any alleged facts or purported denials that are unsupported by the record or do not comply with Local Rule 56.1. *See Brasic v. Heinemann's Inc.*, 121 F.3d 281, 284 (7th Cir.1997).

Plaintiff Ricardo Delgado was hired by Certified Grocers in the summer of 2000 as a temporary employee. By August, Certified Grocers had offered him a regular full-time position as a Warehouse Picker in the Perishables Department, a union position that was governed by a collective bargaining contract. In this position, Delgado was responsible for filling orders in the dairy, freezer, produce, and meat sections of the department, all of which are refrigerated and/or cold. In order to fill orders, Delgado had to lift items weighing between 1 and 100 pounds, from bins anywhere from 5 inches to 6 feet off the floor, and then place those items on a pallet and shrink-wrap the pallet.

Delgado first injured his shoulder at work on November 1, 2001. Certified provided Delgado with an eight-week leave of absence and two months of light duty upon his return. Delgado was told by his union stewards that the collective bargaining agreement provided for only two months of light duty, after which an employee would be sent home until he received a full release. Certified provided Delgado with another leave of absence from February 13 to October 13, 2002, during which Delgado received benefits, health insurance, and

temporary total disability benefits. Delgado returned to work on full duty with no restrictions on October 14, 2002.

On June 11, 2003, Delgado re-injured his shoulder but remained on full duty without restrictions until August 21, 2003, when his doctor placed him on light duty with certain lifting restrictions. Certified provided light duty work for Delgado within his restrictions through October 20, 2003, amounting to more than eight weeks of light duty.

Delgado had surgery on his shoulder on January 26, 2004, following which Certified provided him with a leave of absence until May 18, 2004, along with benefits, health insurance, and temporary total disability benefits. On May 18, 2004, Delgado returned to work with restrictions, and Certified Grocers provided him with light duty consistent with those restrictions. Ultimately, on October 8, 2004, Delgado's doctor determined he had reached "maximum medical improvement" and placed him on permanent restrictions consisting of no overhead lifting and no frontal plane lifting over 50 pounds. Certified provided him with light duty consistent with his restrictions through November 17, 2004. In November, Delgado noticed numbness, tingling, and swelling in his arm. His doctor diagnosed him with carpal tunnel syndrome unrelated to his shoulder injury and placed him on a leave of absence. Delgado saw several other doctors in February and April 2005, who advised him not to lift more than 50 pounds, lift overhead, carry more than 25 pounds, or work in refrigerated environments. These restrictions have never been lifted.

Appendix B

Delgado attempted to return to work in April 2005, but because of his permanent medical restrictions, Certified Grocers determined that Delgado was not eligible to continue working in his bargaining unit job and sent him home on April 15, 2005. Once Certified Grocers determined that Delgado could no longer perform the job of Warehouse Picker, they provided him with vocational rehabilitation. Plaintiff never requested an accommodation, filed a grievance, or applied for any other openings at Certified Grocers.

Since his termination, Delgado has applied for jobs and attended job fairs. He has been offered several jobs but has not accepted those offers. From March 30 to May 19, 2006, Delgado worked for Adecco as a mover. He quit this job because he claims that Adecco required him to do work outside of his lifting restrictions and did not pay him in a timely fashion. Delgado filed a charge with the Illinois Department of Labor and was ultimately able to recover his back pay. Delgado claims that it is very difficult for him to find jobs on account of his 6th grade education; his job experience, which is limited to jobs requiring lifting; and his medical restrictions. However, he has been offered several jobs and has not accepted those jobs. All were either within his work restrictions or he did not inquire as to what the lifting and carrying requirements of the job would be.

Delgado is currently unemployed, attending school in order to obtain his GED, and searching for jobs. He lives with his wife and two children, one of whom is a minor. He cares for his minor child, getting him ready

for school, preparing lunch, overseeing his activities and attending his basketball games and other events. He can take care of himself and walks to keep in shape. In addition, he does household chores such as cleaning the table, loading the dishwasher, driving his children places, and playing with his children. Occasionally, he does the grocery shopping. He carries a backpack filled with schoolbooks to school but does not know if the bag weighs more than 25 pounds. His injury prevents him from doing maintenance work on the rental properties that he owns.[1]

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1. In his deposition, Delgado testified that he does not know how to cook and does not own a vacuum cleaner. He testified that he does not sweep, make beds, or wash dishes but did not attribute these choices to his injury. When asked if there was anything he was unable to do now, either professionally or personally, that he had been able to do prior to his injury, he answered, "I don't know ." In his post-deposition affidavit, Delgado claims that he does not do many household chores including vacuuming, sweeping, doing laundry, making beds, and grocery shopping because such activities require lifting and reaching that aggravates his shoulder injury and causes him pain. A party cannot create an issue of fact in order to avoid summary judgment by contradicting his own prior testimony. *Darnell v. Target Stores, Inc.*, 16 F.3d 174, 177 (7th Cir.1994). Delgado's affidavit directly contradicts his deposition testimony and accordingly, we cannot credit these portions of his affidavit. Delgado does not supply any explanation for the difference between his deposition and his affidavit, and there is no indication from his deposition testimony that he was confused as to the questions he was being asked in the deposition and therefore did not clearly explain himself. *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 532-33 (7th Cir.1999).

Delgado filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on December 29, 2005[2], and upon receiving his right to sue letter, brought this suit, alleging that he was terminated on account of his disability in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"). At the close of discovery, Certified Grocers filed the instant summary judgment motion.

LEGAL STANDARD

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact by specific citation to the record, at which time the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue of fact for trial. Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct.

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2. Certified Grocers filed a motion to dismiss based upon the alleged untimeliness of Delgado's EEOC charge, which we denied, holding that under the circumstances, an analysis of whether or not the EEOC charge was timely filed could not be adjudicated in a Fed.R.Civ.P. 12(b)(6) motion. Certified Grocers has not continued to protest the timeliness of the EEOC charge, so we presume that the charge was timely filed on December 29, 2005, as Delgado alleges.

2548, 91 L.Ed.2d 265 (1986). A "genuine issue" in the context of a motion for summary judgment is not simply a "metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); rather, "[a] genuine issue exists when the evidence is such that a reasonable jury could find for the non-movant." *Buscaglia v. United States*, 25 F.3d 530, 534 (7th Cir.1994). At summary judgment, we construe all facts and draw all inferences from the record in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

DISCUSSION

Delgado complains that Certified Grocers terminated him rather than accommodate his disability in violation of the ADA. The ADA prohibits employment discrimination against a qualified individual with a disability because of the disability of that individual. 42 U.S.C. § 12112(a). Discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). In addition, discrimination includes "denying employment opportunities to an . . . employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." 42 U.S.C. § 12122(b) (5)(B).

Appendix B

The ADA's remedies are available only for discrimination against "qualified individual[s] with a disability." 42 U.S.C. § 12122(a); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999). In other words, if Delgado is not disabled within the meaning of the ADA, he may not recover under the statute. *Williams v. Excel Foundry & Machine, Inc.*, 489 F.3d 309, 311 (7th Cir.2007). Delgado can prove that he is disabled under the ADA by establishing that: 1) he has a physical or mental impairment that substantially limits one or more major life activities; 2) he has a record of such impairment, or 3) he is regarded as having such an impairment by his employer. 42 U.S.C. § 12102(2)(A); *see Kampmier v. Emeritus Corp.* ., 472 F.3d 930, 937 (7th Cir.2007). An analysis of whether or not an individual is disabled under the ADA is made on a case-by-case basis. *Id.* at 938; *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002). Delgado claims that his lifting restrictions "substantially limit" his major life activity of working, that Certified Grocers regarded him as being disabled, and that he is otherwise a qualified individual. We examine each of his claims in turn.

Appendix B

A. Impairment That "Substantially Limits" a Major Life Activity

Delgado claims that his shoulder injury and the restrictions it necessitates substantially limits him in the major life activity of working. Delgado's physicians have restricted him to lifting no more than 50 pounds, to carrying no more than 25 pounds, and from doing any overhead lifting or work in cold or refrigerated areas.

As the Supreme Court has explained, "merely having an impairment does not make one disabled for purposes of the ADA." *Toyota Motor*, 534 U.S. at 195. The requirement that the disability, to be recognized as such, must "substantially limit" a major life activity is a "demanding" standard. *Id.* at 197; *Scheerer v. Potter*, 443 F.3d 916, 919 (7th Cir.2006). A disability that "substantially limits" a major life activity is one that either leaves the individual unable to perform or significantly restricts the individual from performing a major life activity that the average person in the general population can perform. *Kampmier*, 472 F.3d at 937; see also *Toyota Motor*, 534 U.S. at 198; 29 CFR 1630.2(j)(1)(i)-(ii). The nature of the limitation is considered "in light of that which most people do in their daily lives, not with reference to a specific job." *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 801 (7th Cir.2005); *see also Toyota Motor*, 534 U.S. at 201.

An individual who claims that he is substantially limited in the major life activity of working must show that his condition restricts him in his ability to perform

a class of jobs or a broad range of jobs in various classes "as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630(j)(3)(I); *Kupstas v. City of Greenwood*, 289 F.3d 609, 612 (7th Cir.2005). The Supreme Court has emphasized that, assuming working can be considered a major life activity at all, a claimant must show "an inability to work in a 'broad range of jobs,' rather than a specific job." *Toyota Motor*, 534 U.S. at 200; *E.E.O.C. v. Schneider Nat., Inc.*, 481 F.3d 507, 511 (7th Cir.2007). The Seventh Circuit requires that a plaintiff claiming an inability to work in a broad range or class of jobs must demonstrate that his impairment "substantially limits" employment generally, rather than simply precluding him from performing a "particular specialized job or a narrow range of jobs." *Id.* (internal citations omitted). To do so, a plaintiff must present evidence of the number and type of jobs in his geographical area from which he would be excluded as a result of his impairment. *Id.*; 29 C.F.R. § 1630.2(j); *E.E.O.C. v. Rockwell Intern. Corp.*, 243 F.3d 1012, 1017 (7th Cir.2001).

Delgado asks us to conclude that his lack of success in job hunting is due to his work restrictions, claiming that employers are generally unwilling to hire someone with work restrictions. While Delgado has not been inun with job offers, he offers no evidence that he was turned down from a job because of his work restrictions. Delgado has appended a significant volume of papers to his response to Certified Grocers' summary judgment motion in support of his claim. These papers consist of fax cover sheets to various employers (only some of

which contain any indication of the position for which Delgado applied), an offer of employment from DoubleTree Hotels as a Housekeeping Houseperson, several rejection letters, job advertisements, forms notifying Delgado that he had been selected to be interviewed, and Delgado's own notes from his job search. There is no information from which we could determine the number of jobs for which Delgado applied, whether he was qualified for the jobs for which he was applying, or the outcome of many of his applications.

Delgado's job history since his termination also contradicts his bare assertion that his work restrictions have prevented him from obtaining employment. He has undergone vocational training, and through the vocational agency, obtained a job as a mover at Adecco. After he quit the job at Adecco, he has been offered at least two other positions—one as a forklift driver (a position he believed Certified Grocers should have transferred him to in order to accommodate his work restrictions) and one as a baggage handler. He did not accept either of these positions. It is inconsistent to claim both that one is substantially limited in the major life activity of working and yet at the same time accept another job and receive job offers for two more jobs. *See Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944, 953 (7th Cir.2000); *Heimann v. Roadway Express, Inc.*, 228 F.Supp.2d. 886 (N.D.Ill.2002).

Furthermore, he has provided no evidence that his inability to lift objects weighing more than 50 pounds, carry more than 25 pounds, or lift overhead means that

he is excluded from a broad class of jobs available to a person of his skills and education. He has failed to provide the required evidence of the number and type of jobs in his geographical area from which he would be excluded as a result of his impairment. *See* 29 C.F.R. § 1630.2(j); *Rockwell Intern. Corp.*, 243 F.3d at 1017. Apparently in an attempt to address this evidentiary requirement, Delgado's counsel proffered to this court an "admittedly unscientific" study that she conducted on the Internet, arguing that Delgado could not afford to hire a vocational expert.[3] This "study" consisted of counsel performing a job search on the website Manpower.com, searching for jobs that she considered Delgado eligible to apply for considering his experience and skills, and then eliminating the jobs that required lifting. Counsel deemed Delgado qualified by virtue of his skills and experience for only 37 of the 444 jobs posted and then, after eliminating jobs requiring lifting, concluded that he was qualified only to perform 17 out of those 37 jobs. Counsel admits that she is not an expert but claims that the "study" was an effort to demonstrate that Delgado was barred from a wide range of jobs.

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3. Counsel explains that Delgado could not afford to hire an expert to opine as to the state of the labor market and Delgado's employment opportunities. This is not an acceptable excuse for a failure to present evidence, as means exist by which individuals with demonstrated financial need may appeal to the court for aid. *See* 28 U.S.C. § 1915. Furthermore, it does not excuse the lack of any information concerning the number and type of jobs available in the region, which this Court presumes may be available from public records and statistics kept by federal and state agencies in the course of their business.

Appendix B

This "study" is not admissible as evidence under Fed.R.Evid. 702. Essentially, counsel offers this "study" to prove that Delgado is restricted to applying for only one third of the jobs available to a person of his skills and experience. The foundation for her opinion is data gathered and analyzed by her, using criteria and standards she has developed—essentially, an expert opinion. Not only did counsel not disclose this "study" to Certified Grocers in discovery, but she admits that she is not qualified as a vocational expert and that her study is generally unscientific. Accordingly, we determine that this evidence is being offered as scientific evidence, in the form of statistics, but lacks any foundation at all which would assist a trier of fact in understanding the evidence or determining a fact in issue as required for admissibility under Fed.R.Evid. 702. Therefore, counsel's study and her accompanying affidavit are stricken from the record.

Accordingly, we conclude that Delgado has not presented evidence that his inability to lift more than 50 pounds, lift overhead, and carry more than 25 pounds has excluded him from a broad class of jobs. *See, e.g., Kupstas*, 398 F.3d at 613 (employee not disabled within the meaning of the ADA when he was unable to rake or shovel for more than 2 hours continuously or 4 hours in a day and could lift no more than 55-60 pounds); *Contreras v. Suncast Corp.*, 237 F.3d 756, 763 (7th Cir.2001) (employee unable to lift in excess of 45 pounds for a long period of time, unable to engage in strenuous work, and unable to drive a forklift for more than four hours a day did not have an ADA-qualifying disability);

see also Williams v. Excel Foundry & Machine, Inc., 489 F.3d 309, 312 n. 2 (7th Cir.2007); *Mays v. Principi*, 301 F.3d 866, 870 (7th Cir.2002) (noting that many Americans are limited in their ability to lift heavy objects). Therefore, he has not shown that his lifting restrictions substantially limit him in the major life activity of working such that he may be considered disabled under the ADA.

B. "Regarded as Disabled" by Employer

Even though Delgado may not have a disability as recognized by the ADA, he may show that his employer regarded him as disabled in order to come within the protections of the ADA. To show that his employer regarded him as disabled, he must show that either 1) the employer mistakenly believed that he has an impairment that substantially limits a major life activity or 2) the employer mistakenly believed that an existing impairment that is not really limiting does substantially limit a major life activity. *Cassimy v. Bd. of Educ. of the Rockford Public Schools, Dist. # 205*, 461 F.3d 932, 937 (7th Cir.2006). Simple awareness does not equate to a belief of a substantially limiting condition. *Id.* As the Seventh Circuit has explained, "If the condition that is the subject of the employer's belief is not substantially limiting, and the employer does not believe that it is, then there is no violation of the ADA under the 'regarded as' prong of the statute." *Id.* at 938 (quoting *Mack v. Great Dane Trailers*, 308 F.3d 776, 782 (7th Cir.2002)).

Appendix B

Certified Grocers argues that it did not regard Delgado as having a disability that substantially limited his ability to work, pointing to the vocational training it offered Delgado as evidence of its faith that Delgado could find alternate employment. Furthermore, Certified Grocers argues that it recognized only that Delgado could not perform a specific job—warehouse picker—and for that reason Delgado was fired. However, Delgado claims that Certified Grocers regarded him as disabled because he was fired pursuant to a policy under which employees who are deemed permanently restricted are automatically fired (a policy Delgado terms a "100% rule"). Delgado cites a Sixth Circuit case, *Henderson v. Ardco, Inc.*, 247 F.3d 645 (6th Cir.2001), for the proposition that one may infer, from an employer's 100% healed rule, that the employer regards the employee as barred from a broad class of jobs. Further, Delgado cites *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir.1988) for the proposition that a 100% healed rule is a violation of the ADA.

Delgado's arguments are more properly addressed to his employer's actions in accommodating him, rather than to Certified Grocers' belief concerning the nature of his impairment. *Henricks-Robinson's* analysis of 100% healed rules simply does not apply to this case, since in Henricks-Robinson, the parties had stipulated that the employees were "qualified individuals with disabilities" under the ADA. *Hendricks-Robinson*, 154 F.3d at 692. In that case, the Seventh Circuit expressly noted that the issue of the employees' disabilities was not before it and that its analysis for the purpose of the ADA began

with an examination of the employer's accommodation efforts. *Id.* Therefore, the court discussed the employer's policies in the context of whether or not the employer failed to accommodate their employees, not whether or not a 100% healed rule is any reflection upon the employer's beliefs concerning their employees' disabilities. Furthermore, the inference drawn by the Sixth Circuit in *Henderson* is equally as inapplicable to the facts of this case; in *Henderson*, the plaintiff's disabilities, which including restrictions on lifting and bending, were more extensive, and the stated reason of the employer in refusing to consider plaintiff for any position in the factory was more encompassing than the actions of Certified Grocers in this case. In fact, in *Henderson*, the court recognized that "if the employer had only a set of relatively physically demanding jobs available and prevented a plaintiff from working these jobs, the employer would not necessarily be 'regarding' the plaintiff as disabled." *Henderson*, 247 F.3d at 653 n. 6.

In the Seventh Circuit, the fact that an employer believes that its employee cannot perform a specific job is not evidence of a general belief that the employee is unable to work in a broad class of jobs. *Kupstas*, 398 F.3d at 615. At most, the evidence shows that Certified Grocers believed that Delgado's lifting restrictions prevented him from working in their refrigerated warehouse and that their contract with Delgado's union prevented them from transferring him elsewhere in the company, rather than any belief on their part that Delgado was incapable of working generally. In fact,

Delgado admits that his permanent restrictions prevent him from performing the essential functions of his position as a warehouse picker. Accordingly, we find that Delgado has not presented any evidence that Certified Grocers believed he was substantially limited in his ability to work in a broad class of jobs or that he had a disability under the ADA.

C. A "Qualified Individual"

The ADA provides protections only for "qualified individual[s] with a disability," which is defined in the statute as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." An employee who cannot perform the essential functions of the job, even with reasonable accommodation, is not a "qualified individual" under the ADA. *Rooney v. Koch Air, LLC*, 410 F.3d 376, 382 (7th Cir.2005). Delgado has admitted that, at the time of his termination, he could not lift the 100 pounds required of a Warehouse Picker, could not work in cool temperatures in the warehouse, and could not do the overhead lifting required of a Warehouse Picker. Thus, regardless of whether or not Delgado's impairment rises to the level of a disability as recognized by the ADA, he is not a "qualified individual" under the statute because he has conceded that he could not perform the essential functions of his position and that there is no accommodation that exists that would help him to perform the functions of his job. Accordingly, the protections of the ADA are not available to him.

Appendix B

CONCLUSION

For the foregoing reasons, Certified Grocers' motion for summary judgment is granted, and judgment is entered in its favor.

s/ Charles P. Kocoras
United States District Judge

Dated: August 16, 2007